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No. 97-1656

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LINDA SLOAN,
Petitioner,

v.

JOHN SHARP, Comptroller, In His Capacity as Head of Comptroller of Public Accounts for the State of Texas and STATE OF TEXAS,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was it reversible error for the trial court to decline to instruct the jury, in a suit under Title VII of the Civil Rights Act of 1964, that the employer entity is, in effect, strictly liable for the alleged sexual harassment of the plaintiff by a lower-level supervisor, when the plaintiff failed to satisfy the essential elements of either a "quid pro quo" or a "hostile environment" sexual harassment claim, resulting in a verdict for the defendant?

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STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

STATEMENT OF THE CASE

Linda Sloan, a former employee of the Comptroller of Public Accounts for the State of Texas,[1] sued the Comptroller and her

[1]Which, as the trial court noted and as the petitioner acknowledges, Pet. at 8 n. 1, is legally identical to the "State of Texas" and to "John Sharp in his official capacity as Comptroller," whom Sloan originally set out in her pleadings as separate defendants. Here, as in the Petition for Writ of

former immediate supervisor, Grundy Wiley, for sexual harassment. Her separate claim under 42 U.S.C. § 1983 against Wiley was dismissed by the trial court, the dismissal was affirmed on appeal, and Sloan does not seek to revive that claim here. Consequently, her petition to this Court concerns only her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), against the Comptroller for sexual harassment of her by Wiley.

The jury to whom Sloan presented her c[illegible] heard evidence from which it could, and apparently did, reasonably conclude as follows:

Prior to coming under Grundy Wiley's supervision in 1989,[2] Linda Sloan had a history of insubordination, for which she was reprimanded. Trial transcript at pages 351-352 (Tr. 351-352). From 1988 (at the latest) onward, Sloan was frequently counseled about depleting her sick leave and excessive absence. Tr. 258-265.

Wiley was "friendly" and "approachable" toward women in the Comptroller's Houston southwest office where he and Sloan worked. Tr. 98-99. However, as at least five witnesses testified, he did not behave offensively, inappropriately, flirtatiously, or unprofessionally. Tr. 100, 103-105, 112-113, 141, 538, 545. Wiley did not make a practice of hugging female employees. Tr. 389, 545. On a few occasions Wiley walked in the office in his socks, when a new pair of shoes were hurting his feet. Tr. 85-86, 111, 386-387. When another female employee appeared in the office wearing an evening gown, Wiley, after conferring with higher management, counseled her to dress more appropriately.

Certiorari, the defendant is referred to as "the Comptroller."

[2]Before he became her supervisor, Wiley was on an employee softball team with Sloan in San Antonio, but he never asked her out for drinks. Tr. 379-380.

Tr. 392-394.

In the summer of 1990, unbeknownst to Wiley, his sister arranged for a stripper to perform at the office on Wiley's birthday. Tr. 111-112, 137-141, 148-149, 390-392, 538-540. Surprised and embarrassed, Wiley ordered the performance halted before the dancer removed her clothes, much to the annoyance of the assembled employees (including many of the women). *Id.* Sloan was not ordered to attend the event nor prevented from leaving. Tr. 538-540.

Sloan had difficulty completing tasks, concentrating on details, and following directions. Tr. 113, 354, 358. These problems were especially evident when she had to learn a new automated collection system the office adopted. Tr. 360-362, 369. Together, Wiley and female supervisor Fern Francis spent time at Sloan's desk assisting her with the new system. Tr. 101-102. But Wiley helped others also, and did not spend an inordinate amount of time with Sloan. Tr. 113, 142, 387-388.

Wiley did not enter Sloan's office shoeless, sit on her desk without shoes, or put his shoeless feet on Sloan's feet. Tr. 386. Wiley accompanied Sloan to "the field," as he did the other enforcement officers, but he never put his hand on Sloan's leg. Tr. 388. He did not ask Sloan about her boyfriends, nor did he ask her any more personal questions than he asked other employees. Tr. 380-381. Wiley asked Sloan and other employees to lunch on occasion, but Sloan never objected. Tr. 382-383. Wiley never joined Sloan for lunch uninvited. Tr. 383.

Wiley did not intrude on Sloan's privacy at home. He did not ask Sloan to let him come to her house for dinner. Tr. 383. Nor did ever push his way into her home. Tr. 388. He once delivered a travel reimbursement check to her house, during the daytime, but only after she had repeatedly contacted his secretary indicating that she needed the money urgently. Tr. 448-449.

Once, after work hours, when Wiley was about to leave town and needed to get into the office, but did not have his pass key, he contacted employees who lived close to the office for assistance. Tr. 385-386. After calling two others (both males) who did not answer, he called Sloan. *Id.* Without objection, Sloan met him at the office with her pass key. *Id.* Wiley was accompanied by his son, who was eleven or twelve at the time, and Sloan was accompanied by her husband. Tr. 386.

Wiley never told Sloan that if she were nicer to him she could get more out of him. Tr. 353. Nor did he, in any other words, promise any job-related reward for sexual favors. Tr. 366. Because she made progress in her performance, Wiley recommended Sloan for a promotion, which she received in early 1992, with a raise. Tr. 352, 367-368, 443-448.

Alleged acts of harassment of Sloan by her peers Navarro (remark that he could bring her to climax), Herron (touching her leg), and Moore (inviting her to sit on his lap) were never reported to Wiley. Tr. 388-389. Nor were they reported to Sloan's direct supervisor at the time, Paul Eicke. Tr. 136-137. Darrell Stewart, who witnessed the "climax" remark, did not report it either to Wiley or to the Comptroller's investigator Judy Brittain. Tr. 94-95. Wiley never said to Sloan, in response to any of the foregoing incidents, that, "This is a man's world and women have to get used to it." Tr. 390.

However, in May of 1992, when Sloan did report to Wiley a crude remark by employee Jodie Moore, that some change Sloan had brought him had pubic hairs in it, Wiley made Moore apologize, orally reprimanded him, and moved him to an area away from Sloan. Tr. 113, 300-301, 371-372, 381. Wiley and Moore did not laugh together about it afterward. Tr. 372, 400.

In late June of 1992, Sloan accused supervisor Fern Francis of intentionally bumping into her in the hallway. Tr. 289-290, 370-

371, 483-484. At about the same time, Wiley reprimanded Sloan for errors in her use of the automated collection system. Tr. 371. Thus, the stage was set for her July 1992 "bumping" allegation.[3]

The alleged "bumping" followed a July 8, 1992, birthday celebration in the office breakroom, which Wiley did not attend. Tr. 373-374. Not being present at the party, Wiley did not pinch Sloan on the buttocks while standing in line behind her for cake and punch. Tr. 373-375, 546. Thus, Sloan did not declare in response to the pinch that she would "slap the shit" out of Wiley. Tr. 375, 546.

Shortly after the party, fellow employee Rose Bonney stood conversing with Sloan in the hallway. Tr 546. Wiley, who was walking down the hall looking in another direction, bumped into Sloan. Tr. 373-376, 547. Neither Sloan nor Bonney was knocked down. *Id.* Sloan did not appear to Wiley to be hurt. Tr. 415. Wiley apologized and asked if Sloan was "okay," to which Sloan replied, "Do you have a problem?" Tr. 374, 548. Sloan and Bonney then continued their conversation. Tr. 549. Sloan did not complain to Bonney that she had been hurt and did not have to be assisted back to her office. *Id.*

Later that day, when Sloan complained to Eicke, he insisted that she contact Judy Brittain at the Comptroller's Austin headquarters. Tr. 466. Sloan did not indicate to Eicke that she felt she had been sexually harassed. Tr. 467. Ms. Brittain was the employee assistance liaison, responsible for assisting employees with a wide range of personal problems. Tr. 468-471. In her initial call to Brittain on or about July 8, 1992, and in five or six calls thereafter, Sloan did not describe the "bumping" in terms

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[3]The trial judge would not allow the Comptroller to present evidence of prior occasions, while Sloan worked for the Comptroller in Austin, when Sloan accused supervisors or peers of deliberately bumping into her, soon after or just before she was reprimanded for her conduct or performance. Tr. 24-27, 33-35.

suggesting sexual harassment. Tr. 479-482.

On July 21st, Sloan finally complained to Brittain of the "bumping" as sexual harassment. Tr. 482. Sloan admits that Brittain took her charge seriously. Tr. 283. Pursuant to Brittain's standard practice, her assistant listened in (with the complainant's knowledge) and took shorthand notes of Sloan's statement as Brittain questioned her. Tr. 482, 485, 513-516, 532-534. Subsequently, a typed statement was presented to Sloan for her review. *Id.* Although given the opportunity to edit and revise the statement, Sloan neither amended it nor signed it. Tr. 292-294, 485-486, 533-534. Nor did she identify, prior to trial, how the statement was incorrect. Tr. 294-298. Sloan's statement to Brittain included nothing about Wiley's "rescinding" a promised raise, pinching her, putting his hand on her leg, or tolerating harassment by other employees. Tr. 291.

Brittain talked to all of the people identified by Sloan as potential witnesses. Tr. 143-144, 377, 419-420, 487-494, 527-529. Sloan did not identify co-workers Craddock, Coleman, Shepherd, and Bridges to Brittain as persons with relevant knowledge. Tr. 487. However, Bridges' testimony was supportive of Wiley, Tr. 110-114, while Craddock, Shepherd, and Coleman did not witness harassment of Sloan. Tr. 69-70, 86, 102-103.

After her thorough investigation, Brittain presented the results to the executive committee (consisting of the highest officials of the agency after the Comptroller), who reviewed them and concluded that Wiley had not sexually harassed Sloan. Tr. 478-479, 494-495.

In November of 1992, Wiley placed Sloan on probation for excessive absences. Tr. 234. A thorough medical examination, in conjunction with Sloan's worker compensation application, casts serious doubt on her claim of injury resulting from the July 1992

"bumping." Tr. 304-310. In May of 1993, Sloan was transferred to another field office, where she worked for five days before leaving and never returning to work. Tr. 266-267.

Under the state Appropriations Act, which governs all state agencies, an employee must be removed from the payroll after twelve months of leave without pay. Tr. 557-558. After a year on leave without pay, Sloan was terminated by the Comptroller effective December 31, 1995. Tr. 236-237. The January 4, 1996 termination letter informed Sloan that she could re-apply for a position during the next six months, but she never did. Tr. 267-268.

When Debra Shepherd complained in late 1993 that Jodie Moore had sexually harassed her, Judy Brittain investigated and upheld the charge. Tr. 83-804, 504. Although Shepherd complained only once, and incompletely, to Wiley, Tr. 79-80, the Comptroller terminated Wiley in early 1994 and demoted Francis[4] for failing to report Shepherd's complaint of harassment. Tr. 84-85, 340-341, 402, 537.

As acknowledged in the Petition for Writ of Certiorari ("Pet.") at 7, the jury found for the defendants Comptroller and Wiley, and the judgment on the verdict was affirmed on appeal.

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[4] Francis' demotion lasted a year, since which she has not been restored as a supervisor. Tr. 537, 541.

ARGUMENTS FOR DENYING THE PETITION

I. Because The Petitioner Failed To Prove Sexual Harassment, The Issue Of Whether The Trial Court Correctly Instructed The Jury On The Respondent's Liability For The Supervisor's Conduct Is Moot.

Sloan argues in her petition that because the trial judge refused to instruct the jury, in effect, that "once Wiley had knowledge of sexual harassment, even if Wiley was the harasser, Wiley's knowledge was imputed to the [Comptroller]," consequently "the jury did not understand . . . that if it believed the testimony of Sloan and other witnesses with regard to Wiley's sexual harassment and Wiley's failure to report sexual harassment to upper management, the [Comptroller] was liable for sexual harassment under Title VII unless the [Comptroller] took prompt remedial action." Pet. at 8-9.

Under well-settled Fifth Circuit precedent which Sloan does not challenge, the court below, correctly, reviewed the trial court's jury instructions with deference, refusing to reverse the judgment unless Sloan could show (1) that her proposed instruction correctly stated the law, and (2) that the court's instruction, in the context of the charge as a whole, was misleading. App. A at 6a-7a. *See also,* Wright & Miller, 9A FED. PRAC. & PROC. CIV. 2d (1995) at §§ 2556, 2558.

Even if Sloan could show that the trial court's instruction was incorrect — which she cannot — the charge cannot have misled the jury because, as a matter of law, Sloan did not prove sexual harassment. Only if reasonable jurors could have found from the evidence that Wiley harassed Sloan could the jury have been "misled" about when the Comptroller's duty to remediate the harassment arose.

Sloan's allegations against Wiley fall into three categories: (1) Wiley's alleged quid pro quo harassment of Sloan, (2) Wiley's alleged acts directly creating a "hostile environment," and (3) Wiley's alleged toleration of "hostile environment" harassment of Sloan by her co-workers.

A. The Petitioner Failed to Prove Quid Pro Quo Harassment

As a matter of law, the quid pro quo claim fails on the merits, regardless of respondeat superior liability.[5] The trial court properly instructed the jury, *without objection by Sloan*, that to prevail on a quid pro claim, the plaintiff had to prove that "[t]he acceptance or rejection of the harassment by Plaintiff [was] an express or

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[5]The record is quite consistent that, while Wiley had a variety of supervisory responsibilities — e.g., to "motivate staff," to evaluate employees, to give oral reprimands, to assign personnel to specific workspaces, Tr. 348-349, 351-353, 365, 371-372, 381-382 — when it came to terminations, raises, and promotions, Wiley could only *recommend* action. Tr. 246, 352. Eicke testified only that "the State of Texas" could fire him. Tr. 148. And there is absolutely no indication from the evidence that Wiley had any sort of hiring authority. Indeed, it appears that transfers of employees in and out of Wiley's unit had to be approved by the division director above Wiley. Tr. 501-502. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1985), this Court, while "declin[ing] the parties' invitation to issue a definitive rule on employer liability," declared "that Congress wanted courts to look to agency principles for guidance in this area," cautioning that "such common-law principles may not be transferable in all their particulars to Title VII . . ." *Id.* at 477 U.S. 72, 106 S.Ct. 2408. Under Texas common law, "agency principles" apply differently to a state agency than to a private corporation. In contrast to a private principal, a state agency cannot be bound beyond an agent's *express* authority. *Moore v. Office of Atty. Gen.*, 820 S.W.2d 874, 878 (Tex. App. — Austin 1991, no writ) ("the rule that an agent can bind his principal by acts within his apparent authority has been held not to apply to public officers"); *Fazekas v. University of Houston*, 565 S.W.2d 299, 304 (Tex. Civ. App. — Houston [1st] 1978, writ ref. n.r.e.), *appeal dismissed*, 440 U.S. 952, 99 S.Ct. 1487 (1979), relying on *State v. Ragland Clinic-Hospital*, 159 S.W.2d 105 (Tex. 1942).

implied condition to the receipt of a job benefit or the cause of a tangible job detriment . . ." Because, by her account, she spurned all of Wiley's advances, Sloan thus committed herself to show that "rejection of [Wiley's] harassment [was] the cause of a tangible job detriment."

However, the uncontrovered evidence, not only from Wiley's testimony but from the personnel records of the agency, shows that in February of 1992, after the date of most of Sloan's pre-"bumping" allegations, Sloan received, pursuant to Wiley's recommendation, a promotion to Enforcement Officer IV and a raise. Sloan's subjective belief that she was not promoted, Tr. 247-248 ("Not to my knowledge"), is not evidence.

Even if Sloan were not required to show tangible adverse consequences for spurning Wiley's advances, it would make no difference for this case. To treat the one isolated remark Sloan attributes to Wiley — i.e., that "if [she] would be . . . nicer to him [she] could get more out of him," Tr. 248 — as conditioning job-related benefits on sexual benefits would trivialize the claim of quid pro sexual harassment. Any verdict based on that evidence, regardless of what the jury was instructed as to the Comptroller's vicarious liability, would be subject to judgment as a matter of law for defendants under Fed. R. Civ. Pro. 50(b)(1)(c). *Cf., Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 211-212 (7th Cir. 1986) (the comment, "what will I get for it?," in response to the plaintiff's request for assistance, was not sexual harassment).

Thus, even under the standard favored by the plurality opinion in *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom., Burlington Industries, Inc. v. Ellerth*, __ U.S. __, 118 S.Ct. 876 (1998), Sloan would lose. Under that view, a supervisor's threat may constitute quid pro quo sexual harassment without subsequent adverse action, but only when the "threat . . . *clearly* conditions *concrete* job benefits or detriments on compliance with sexual demands . . ." *Id.* at 123

F.3d 499 (FAUM, J., concurring) (emphasis added). The plurality's reasoning was that "a *clear* and *serious* quid pro quo threat alters the 'terms and conditions' of employment . . . even if the threat remains unfulfilled." *Id.* (emphasis added). The cases relied upon by the plurality similarly stress clarity and concreteness. *Id.* at n. 6 (e.g., "intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation"). Note that in each of the cases consolidated in the *Jansen* decision, the supervisor made "repeated advances." *Id.* at 493 (per curiam).

B. The Petitioner Failed to Prove Hostile Environment Sexual Harassment.

The trial court correctly charged the jury, *without objection*, that Sloan "must prove that harassment was sufficiently severe or pervasive so as to alter the conditions of the Plaintiff's employment and create an objectively hostile . . . or abusive environment, one that a reasonable person would find or abusive." *See, Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993), citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65, 67, 106 S.Ct. 2399, 2404-2405 (1986).

Even according to Sloan's version of the events, the alleged harassment was not so severe or pervasive as to violate Title VII. According to Sloan, over a two to four year period:

* Wiley called Sloan into his office and visited her desk more than he did other employees;

* Wiley walked into Sloan's office without shoes on (but not barefooted), sometimes sat on her desk, and on an unspecified number of occasions touched Sloan's feet with his unshod feet;

* Wiley asked Sloan "personal" questions, such as what kind of perfume she was wearing;

* Wiley asked Sloan out to lunch and on one occasion joined Sloan and another employee for lunch uninvited;

* Wiley called Sloan at home in the evening "ten or more" times, sometimes asking if he could come over for dinner;

* On one occasion Wiley put his hand on Sloan's upper leg while they were in the car together;

* On one occasion, Wiley had Sloan (accompanied by her husband) meet him at the office after hours so he could use her pass key to get into the building;

* On one occasion, when Sloan was home sick, Wiley took an expense check to her house, "*sort of* pushed his way in," asked her how she was, and said he missed her and wanted her to return to the office;

* On one occasion, Wiley told Sloan that if she would be nicer to him she might get more out of him;

* On one occasion, a stripper performed in the office (indisputably without Wiley's prior knowledge or consent) for up to twenty minutes before being made to stop;

* On one occasion, Sloan felt a pinch on her buttock (though she did not actually see Wiley do it);

* On one occasion, Wiley bumped into Sloan in the hallway.

Brief of Appellant Linda Sloan (5th Cir.) at 7-9, 11, 13. The fact that Sloan has compiled a seemingly lengthy list does not render Wiley's conduct objectively abusive. Most of the acts are

not even "sexual," much less harassment. Sloan's subjective interpretation of acts as sexual — Tr. 171 ("he placed his feet on mine . . . in a sexual manner"; Sloan "felt it was a suggestive — come-on"); 239 ("interpret[ing]" a co-worker's conduct as "sexual"), 248 (Sloan "interpret[ed]" Wiley's "be nicer" remark as meaning "[a] sexual relationship") — does not make them that. A reasonable person, for example, ordinarily would not regard such things as running into someone in the hallway, even if intentional, as conduct "based on sex" (an essential element of the claim). Note that Sloan also charged female supervisor Fern Francis with intentionally bumping into her.

Nor would a reasonable person find many of Wiley's alleged acts so egregious as to alter the conditions of employment. Asking a woman what perfume she is wearing, or, when she has been sick, telling her that she is missed, is something that any supervisor, male or female, might do. Asking an employee to go to the office after hours to let the boss into the building with her pass key might be an imposition, but it is hardly oppressive and is certainly not sexually abusive. A female co-worker, called by Sloan as a witness, testified that she herself sometimes walked through the office without shoes and was not at all put off by Wiley's doing so. Tr. 111. Counseling an employee that being nicer may get her better results with management (i.e., more flies with honey than with vinegar, etc.) is good advice. A male manager should not have to fear that such a remark could subject himself or his agency or company to liability for sexual harassment.

Consequently, Sloan was obliged to show more of a detrimental impact than she did. Although, to be actionable under Title VII, sexual harassment need not "cause a tangible psychological injury," nevertheless it must be "severe or pervasive enough to create . . . an environment that a reasonable person would find hostile or abusive . . ." *Harris*, 510 U.S. at 21, 114 S.Ct. at 370. A key determining factor is "whether it unreasonably interferes with an employee's work performance." *Id.* at 23, 371.

Far from showing that working conditions palpably deteriorated because of sexually hostile conduct, all that Sloan could offer prior to the "bumping" is that (1) one of her witnesses saw her crying[6] and (2) Sloan did not complete her field work after the leg touching. Brief of Appellant at 8. Even if Sloan's highly dubious attribution of her absenteeism to injuries sustained in the hallway collision is taken at face value, it is not injury from sexual harassment. Such allegations might support some sort of state common law negligence or assault claim, but they do not belong in a Title VII sexual harassment claim.

C. The Petitioner Failed to Prove Toleration of Peer-on Peer Harassment.

Finally, Sloan's allegations of peer harassment tolerated by Wiley suffer many of the same defects as the allegations discussed above. Sloan alleges that Wiley failed to take action on (1) fellow enforcement officer Navarro's comment to Sloan in front of others that he could bring her to climax and (2) co-worker Herron's "inappropriate sexual touching." Brief of Appellant at 10. It is disputed whether either of these alleged occurrences was ever reported to Wiley.

However, as isolated episodes, these alleged acts might be inappropriate but they do not amount to hostile environment sexual harassment. *See, Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) ("the burden [is] upon the plaintiff to demonstrate that injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency"). What Sloan actually testified with regard to Herron is that while driving Sloan and another female employee to lunch, Herron reached back and rubbed the "lower calf" of Sloan, who was sitting in the back

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[6]But the witness did not hear what Wiley said prior to Sloan's crying. Tr. 70-71.

seat. Tr. 238-239. Sloan "interpret[ed]" the "rubbing" as "sexual."[7] Tr. 239.

What cannot be disputed is that when Sloan reported Moore's "pubic hair" remark (which, though tasteless, is not legally an instance of sexual harassment[8]), Wiley reprimanded Moore and made him apologize. Sloan also alleges that Moore once asked her to sit on his lap, but does not claim to have asked Wiley to do anything about it. Tr. 242-243. *See, Scott v. Sears, Roebuck & Co., supra*, 798 F.2d at 211-212.

II. The Fifth Circuit Decision In This Case Is Not In Conflict With That Of Any Other Circuit.

In her petition at 11-15, Sloan does not identify a true conflict among the circuits with respect to the facts and issues of this case. The holdings of the decisions on which the petitioner relies, if applied to her case, would not alter the outcome.

In *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), both the instruction sought by the plaintiff and the instruction the appeals court said the trial court should have given differed significantly from the instruction sought by Sloan in her trial. The *Harrison* decision deals with the proper instruction for a hostile environment sexual harassment claim. Under Sloan's proposed charge, the Comptroller would be held liable for the hostile environment created by Wiley "if the supervisor was entrusted with the position of responsibility of supervising the employee." Pet. at 7; App. D at 17a. In effect, the agency or company would be strictly liable whenever the hostile environment

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[7]She also alleged that "on several occasions" Herron asked her to massage his shoulders and once asked her "to give him a smooch." Tr. 239-240.

[8]"Title VII is not a clean language act . . ." *Katz v. Dole*, 709 F.2d. 251, 256 (4th Cir. 1983).

is created by a supervisor. But in *Harrison*, the Tenth Circuit concluded that strict liability "is rarely applicable in hostile work environment cases . . " *Id.* at 112 F.3d 1444. "Generally speaking, an employer will not be charged with constructive knowledge of the harassment merely because a supervisor is the perpetrator of the harassment." *Id.*

Accordingly, the *Harrison* court found no error in the trial court's refusal to give an instruction comparable to that requested by Sloan in this case (that the company "would be liable if [the harasser] had significant supervisory authority over [the plaintiff]"). *Id.*, 112 F.3d at 1451. The court reiterated that "an employer is not strictly liable for hostile work environment sexual harassment committed by one of its supervisors." *Id.*

The *Harrison* court concluded that the instruction in question was "flawed in two major respects": "First, and most significantly," because it told the jury that the company could be held liable for hostile environment sexual harassment "only if [the supervisor] had authority, apparent or otherwise, to harass plaintiff"; and second, because it mis-defined "apparent authority". *Id.*, 112 F.3d 1449-1450. The instructions in Sloan's case did not suffer from those deficiencies; nor did the petitioner object at trial or argue on appeal that they did.

The petitioner characterizes *Karibian v. Columbia Univ.*, 14 F.3d 773 (2nd Cir.), *cert. denied*, 512 U.S. 1213, 114 S.Ct. 2693 (1994), as conflicting with the result in her case both as to quid pro quo harassment and as to hostile environment harassment. Pet. 12. But neither set of holdings in *Karibian* would alter the outcome if applied in Sloan's case.

The Second Circuit agreed "that the district court erred when it required [the plaintiff] to present evidence of actual, rather than threatened, economic loss in order to state a valid claim of quid pro quo sexual harassment." *Id.*, 14 F.3d at 778. However, the court

applied that holding only to "the claim of the employee who submits to the supervisor's demand." *Id.* The court expressly distinguished "a 'submission' case" from a 'refusal' case." *Id.* For the latter: "The gravamen of a quid pro quo claim is . . . that adverse consequences follow from the employee's refusal." *Id.*

Consequently, regardless of the *Karibian* court's holding on agency or respondeat superior concepts (actually, it did not reach those issues for quid pro quo claims), Sloan would still have lost her quid pro quo claim because despite her refusal of Wiley's alleged demands, she nevertheless still received a raise and a promotion on Wiley's recommendation.

The *Karibian* court's holding on employer liability for hostile environment harassment differs markedly from Sloan's requested instruction. "We hold that an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship." *Id.* at 14 F.3d 780. But the court expressly contrasts the situation "where a low-level supervisor does not rely on his supervisory authority to carry out the harassment . . ." *Id.* In the latter instance, the standard is identical to the one articulated by the trial court in Sloan's case. *Id.*

A review of the petitioner's laundry list of allegations in I-B above shows that for each, either (1) Wiley was not using actual or apparent authority (e.g., the stripper episode, the bumping incident); or (2) whether or not he used delegated authority, Wiley's actions were not sexual in nature and/or were not such that a reasonable person would find abusive (e.g., asking Sloan to let him into the office when he had forgotten his key).

In connection with the latter point, the acts of harassment described in *Harrison* and *Karibian* stand in sharp contrast to

Sloan's allegations (even viewed most favorably to Sloan and against the verdict). Contrast *Harrison*, 112 F.3d at 1440-1441; *Karibian*, 14 F.3d at 775-776.

Similar considerations distinguish Sloan's case from that of the petitioners challenging the decision in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.) (en banc), *cert. granted*, __ U.S. __, 118 S.Ct. 438 (1997) . Compare the conduct described in *Faragher v. City of Boca Raton*, No. 97-282, Brief for Petitioner, 1997 WL 793076 *4 - *8. *See also, Faragher*, 111 F.3d at 1540 (BARKETT, dissenting) (noting fact-finding of severe and pervasive harassment).

Additionally, a major tenet of the petitioners' argument in *Faragher*, for holding the city liable for lower-level supervisors' hostile environment harassment, is that the City's sexual harassment policy was minimal, not widely disseminated or known, and weakly enforced. *Id.*, Brief of Petitioner at *13 - *17; 111 F.3d at 1546 (TJOFLAT, dissenting). By contrast, the Comptroller's anti-sexual-harassment policy was strongly worded, widely disseminated, and vigorously enforced. Wiley, for example, was eventually terminated for failure to respond to another female employee's complaint.

Consequently, the Sloan result is not in conflict with, nor would it be altered by, the holdings in *Harrison* and *Karibian*, or the position of the dissent and the petitioners in *Faragher*.

III. Any Error In The Trial Court's Instructions Was Harmless.

Even if, contrary to all the foregoing, the petitioner's theory of liability is correct, Judge Gillmore's charge to the jury still was not reversible error. The court instructed jurors that Sloan must prove "that the Defendants knew or should have known of the harassment in question . . ." Under that instruction, Sloan was free to argue to

the jury in closing that because Wiley "ha[d] the power to make employment decisions concerning [Sloan]'s discipline, promotion, performance evaluations, or termination," the Comptroller was thus "responsible" for knowing about Wiley's acts (tracking language of plaintiff's proposed instructions at App. D 16a-17a).

There is no indication in the record that the court blocked any attempt by the plaintiff to make that argument to the jury. Closing arguments do not appear to have been transcribed, a gap in the record that works against the party with the burden of persuasion (as petitioner and as the party with the burden of proof at trial). The Court must presume, then, either that Sloan chose not to make the argument, or that she made it and the jury did not believe it.

By adopting the magistrate judge's November 30, 1995, Memorandum and Recommendation, denying the Comptroller's motion for summary judgment, the district court concluded that, "if the sexual harassment was as public and pervasive as the witnesses indicate, Defendants, arguably, should have been aware of it, long before Sloan complained to Brittain." Record on Appeal, doc. 114 at 10; adopted in doc. 123. Nothing in the court's instruction prevented Sloan from making that argument to the jury. If she did, the jury obviously was not persuaded.

CONCLUSION

In view of all the foregoing, the respondent respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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